ARAH CIPTA SDN BHD A

v.

PIALA GAGASAN (M) SDN BHD & ANOR

HIGH COURT MALAYA, KUALA LUMPUR B
HANIPAH FARIKULLAH JC
[SUIT NO: D5-22-1754-2005]
27 OCTOBER 2010

CIVIL PROCEDURE: *Res judicata - Cause of action estoppel - Issue estoppel - Whether instant action caught by doctrine of res judicata by reason of earlier action - Whether earlier action and instant action based on same facts and issues* C

COMPANY LAW: *Shares - Preference shares - Redemption - Redemption of redeemable preference shares - Redemption monies to be paid either out of profits available for dividend or out of proceeds of fresh issue of shares - Whether redemption contravened s. 61(3) Companies Act 1965 because company not making profit - Whether shareholders to refund redemption monies to company - Whether a defence for shareholders to show that they were ignorant of the company's financial difficulty* D E

The plaintiff claimed against the first defendant for the return of RM4,678,391.97 paid to the first defendant for the purpose of redeeming redeemable preference shares ("RPS Shares") held by the first defendant in the plaintiff's company. The plaintiff's position F was that the money received by the first defendant was in breach of s. 61(3) of the Companies Act 1965 ('the Act') because the defendant was not making profit. The first defendant contended that it was entitled to legitimately demand for the redemption of the RPS Shares and it was mandatory for the plaintiff to redeem the G shares on the maturity dates. DW1, a director and shareholder of the defendant companies, claimed that the first defendant had no actual and/or constructive knowledge as to the financial state of affairs or the internal management of the plaintiff at all times, and in any event, the plaintiff's obligation to redeem the RPS Shares H did not diminish in any way even if the plaintiff was facing financial difficulties. The issues for determination by the court were: (i) whether the plaintiff had actually made payment to the first defendant from 2001 to 2005 for the purposes of redeeming the RPS Shares; (ii) whether the plaintiff did not make any profit from I 2001-2005 to enable it to redeem the RPS Shares; (iii) whether the first defendant had actual or constructive knowledge that the shares

redemption and/or payments paid out to the first defendant from 2001 to 2005 were from the plaintiff's capital and were not from its profits; (iv) whether the plaintiff had breached s. 61(3) of the Act; and (v) whether the plaintiff was estopped from claiming for the return of the sum of RM4,678,391.97 from the first defendant. Despite the provisions of s. 61(3) of the Act, the first defendant contended that a company could not argue that it did not have any contractual obligation to redeem the redeemable preference shares, simply because it had not made any profit to enable it to do so. It was submitted that whether the company made profit or not, it was still obliged to redeem the redeemable preference shares. The first defendant also contended that the issues raised by the plaintiff that it was not obliged to redeem the RPS Shares based on the alleged non-availability of profits and the alleged breach of s. 61(3) of the Act had previously been raised by the plaintiff when it applied to strike-out the winding-up petition filed by the second defendant in the Johor Bahru High Court ("the JB Suit").

Held (allowing the plaintiff's claim against the first defendant with costs):

(1) In the light of the evidence adduced, the plaintiff had made payments to the first defendant from 2001 to 2005 for the purposes of redeeming the RPS Shares. (para 51)

(2) The fact that there were no audited accounts lodged with CCM for the subsequent years from 2002 indicated that the plaintiff's company was at the material time suffering losses and were unable to declare profits. The management accounts also showed that the plaintiff company was suffering losses. Furthermore, a receiver was appointed on 2 October 2006 over the company. All these facts supported the plaintiff's contention that from the year 2001 to 2005 when the payments were made by the plaintiff to the first defendant for the purposes of redeeming the shares, the plaintiff's company was not profitable and in fact suffered great losses. On the balance of probabilities, the plaintiff had proven that there was no profit available at the material time for the purpose of redeeming the first defendants' shares. (paras 59 & 61)

(3) Based on the evidence, DW1 knew that the plaintiff was insolvent and in financial difficulty. The first defendant never bothered to exercise its right to find out the financial status of the plaintiff. They chose to be ignorant and ignorance is not a defence. (paras 71 & 75)

(4) Section 61(3) of the Act limits the funds from which redemption may be made. In this regard, when the time comes for redemption, the redemption monies will have to be paid either out of profits which would otherwise be available for dividend or out of the proceeds of a fresh issue of shares made for the purposes of the redemption. If the plaintiff had no such profits available or was unable to carry through the necessary fresh issue of shares, the consequence would simply be that the plaintiff would then become in breach of its obligation under arts. 6A(d) and 6B(d) of the plaintiff's articles of association. The first defendant being the preferential shareholders would in such circumstances be entitled to have the plaintiff wound up but certainly not to cause redemption in breach of s. 61(3) of the Act, preferring themselves ahead of all other creditors of the plaintiff. (para 97)

(5) The issues and reliefs sought in the striking out application in the JB Suit did not relate substantively to the issues and reliefs sought in the instant case. Thus, the plaintiff was not estopped from bringing the present action. (para 104)

(6) The payment of RM4,678,391.97 to the first defendant in respect of the redemption of the RPS Shares was contrary to s. 61(3) of the Act. As such, the sum of RM4,678,391.97 was to be refunded to the plaintiff as the first defendant had received the money wrongfully. (para 105)

Case(s) referred to:

Asia Commercial Finance (M) Berhad v. Kawal Teliti Sdn Bhd [1995] 3 CLJ 783 SC ***(refd)***

Commissioner of Taxation v. Coppleson ALR Volume 6 1981-1982 ***(refd)***

Hilton International Limited (in liq) v. Hilton & Anor [1988] 4 NZCLC 64, 721 ***(refd)***

Munusamy Vengadasalam v. PP [1987] 1 CLJ 250; [1987] CLJ (Rep) 221 SC ***(refd)***

Mutual Life and Citizens Assurance Co Ltd v. Mosgiel Ltd [1994] 1 NZLR 146 ***(refd)***

Re Holders Investment Trust Ltd [1971] 2 All ER 289 ***(refd)***

Re Marra Developments Ltd (No 2) [1978] 3 ACLR 798 ***(refd)***

TNT Australia Pty Ltd v. Normandy Resources NL [1989] 1 ACSR 1 ***(refd)***

UOB Venture Investments Ltd v. Tong Garden Holdings Pte Ltd [2000] 3 SLR(R) 585 ***(refd)***

Legislation referred to:
Companies Act 1965, ss. 61(3)(a), 218, 365(1)
Evidence Act 1950, s. 114(g)
Rules of the High Court 1980, O. 18 r. 19

Companies Act 1948 [UK], s. 58(1)
Companies Act 1961 [NSW], s. 61
Companies Act (Cap 50, 1994 Rev Ed) [Sing], s. 70(3)

Other source(s) referred to:
Malaysian and Singapore Company Law & Practice, p 3872

For the plaintiff - Gideon Tan (Zoe Lee Wan Ning with him); M/s Gideon Tan Razali Zaini
For the defendant - Cheah Soo Chuan (Melissa Soon with him); M/s Tay & Partners

Reported by Amutha Suppayah

JUDGMENT

Hanipah Farikullah JC:

Introduction

[1] The plaintiff, Arah Cipta Sdn Bhd has claimed against Piala Gagasan (M) Sdn Bhd ("the first defendant") for the return of RM4,678,391.97 paid to the first defendant for the purpose of redeeming the redeemable preference shares ("RPS Shares") held by the first defendant in the plaintiff's company.

[2] The plaintiff's position is that the money received by the first defendant is in breach of s. 61(3) of the Act because the defendant was not making profit and also undue preference committed by the first defendant under s. 365(1) of the Companies Act 1965 ("the Act"). However in the course of the trial, learned counsel for the plaintiff informed the court that the plaintiff's claim is only in respect of the breach of s. 61(3) of the Act.

[3] In disputing the plaintiff's claim, the first defendant contend that it is entitled to legitimately demand for the redemption of the RPS Shares and it is mandatory for the plaintiff to redeem the shares on the maturity dates.

Agreed Facts

[4] It is an agreed fact that on 13 October 1999, the plaintiff entered into a consent order with the creditors of Perumahan Lanchang Sdn Bhd ("Perumahan Lanchang") in a winding up petition filed by Air Terang Sdn Bhd ("Air Terang") against Perumahan Lanchang in the Kuala Lumpur High Court Companies Winding Up No. 42-197-1986 ("consent order"). Under the terms of the consent order, the plaintiff is to pay RM9,615,500 to Air Terang and RM31,306,928 to contributories of Perumahan Lanchang.

[5] Air Terang had by virtue of two sale and assignment of debt agreements dated 8 December 1999, assigned its rights to the debt of RM9,612,500 owed by Perumahan Lanchang to the first defendant and the debt of RM6,387,500 to Arch Scraper ("the second defendant").

[6] Out of the sum of RM9,612,500, the plaintiff has paid in cash a sum of RM2,403,125 to the first defendant. The plaintiff has also issued and delivered the following Class A RPS Shares in favour of Air Terang which were subsequently issued and delivered to the first defendant as instructed by Perumahan Lanchang:

(a) Share Certificate A001 for 2,403,125 Class A RPS Shares of the plaintiff (RPS-A001) mature on 25 February 2001;

(b) Share Certificate A002 for 2,403,125 Class A RPS Shares of the plaintiff (RPS-A002) mature on 25 February 2002; and

(c) Share Certificate A003 for 2,403,125 Class A RPS Shares of the plaintiff (RPS-A003) mature on 25 February 2003.

[7] The plaintiff also issued and delivered Share Certificate B001 for 6,387,932 Class B RPS Shares maturing on 25 February 2004 in favour of the second defendant.

[8] Together with the issuance of the RPS Shares, the plaintiff's managing director, Firuz bin Saidin ("Firuz") provided the following documents to the plaintiff and the first defendant:

(a) Two letters of undertaking both dated 26 February 2000 stating that Firuz will subscribe the shares RPS-A001, RPS-A002, RPS-A003 and RPS-B001 on or after the maturity date should the plaintiff fails in doing the same; and

(b) Two letters of put option and negative pledge both dated 26 February 2000 requiring Firuz to purchase the matured RPS Shares from time to time upon notice given by the plaintiff and the first defendant to Firuz.

[9] When the Class A RPS Shares held by the first defendant became mature on 25 February 2001, 25 February 2002 and 25 February 2003, the first defendant requested the plaintiff to redeem the Class A RPS Shares.

[10] In view of the plaintiff's failure to fulfil its obligation to fully redeem the Class A RPS Shares, the first defendant filed a winding up petition against the plaintiff on 26 May 2004.

[11] On 23 July 2004, the plaintiff and the first defendant entered into a settlement agreement to settle the debts owed by the plaintiff to the first defendant ("settlement agreement"). After the settlement agreement, the first defendant withdrew its winding-up petition against the plaintiff on 18 March 2005.

[12] When the Class B RPS Shares issued to the second defendant became mature on 25 February 2004, the second defendant requested the plaintiff to redeem the Class B RPS Shares.

[13] In view of the plaintiff's failure to fulfil its obligation to fully redeem the Class B RPS Shares, the second defendant filed a winding-up petition against the plaintiff on 30 August 2005.

[14] To oppose the winding up petition filed by the second defendant, the plaintiff applied to strike it out ("striking out application") under O. 18 r. 19 of the Rules of the High Court 1980 (RHC). The plaintiff striking out application was dismissed on 20 December 2006, and the plaintiff did not appeal against the decision.

[15] Altogether, the plaintiff paid the sum of RM4,678,391.97 by way of 39 payments from 2001 to 2005 to the first defendant.

[16] On 13 April 2007, the plaintiff was wound up as a result of a winding up petition filed by Mohd Yousuf Boo Yong Chong in the Johor Bahru High Court. After the winding up of the plaintiff on 13 April 2007, the second defendant withdrew its winding up petition against the plaintiff.

[17] The liquidator has now decided to continue with this suit against the first defendant.

Preliminary

[18] At the outset of the trial, learned counsel for the plaintiff informed the court that the plaintiff is not continuing its action against the second defendant.

The Plaintiff's Case

[19] The liquidator's position is that the money received by the first defendant is in breach of s. 61(3) of the Act. As such, the liquidator is duty bound to recover the said sum for the benefit of all creditors of the plaintiff.

[20] The plaintiff called a total of three witnesses. The plaintiff's first witness, Mr. Lean Chee Seng ("PW1") is the liquidator appointed by the court to manage the affairs of the plaintiff since 13 April 2007. He is a chartered account by qualification and has 35 years experience as an auditor and liquidator. He is a partner of Lean Oh & Associates since 1976.

[21] PW1 who has access to the financial and accounting records of the plaintiff testified as to the financial position of the company for the financial years 1999 to 2005. PW1 make reference to the financial statements of the plaintiff for the year ending 31 December 1999, 31 December 2000 and 31 December 2001 lodged with the Companies Commission of Malaysia ("CCM") (exh. P1). He informed the court that the audited accounts show that the company suffered increasing losses from year to year. The last filed audited accounts for the financial year ending 31 December 2001 (p. 44 of bundle B) shows accumulated losses over the years of RM4,571,472. According to PW1, as of 30 June 2003 when the last audited account was tabled and approved by the shareholders, the plaintiff did not make any profit but accumulated losses as can be seen in exh. P1.

[22] Further, PW1 testified that *vide* a letter dated 8 October 2002, KPMG, the external auditor of the plaintiff, informed the managing director of the plaintiff, Firuz Saidin that the redemption of shares by the company was in breach of s. 61(3) of the Act due to non-profitability of the plaintiff at the material time. According to PW1, the company is prohibited under the Act to redeem any shares by using the company's capital.

[23] PW1 explained to the court that for a company to redeem preference shares or distribute dividend, it must make a profit before creating such an account and put the money aside for such

purpose. PW1 said that without a proper audit and/or account in place before a general meeting of shareholders there can never be a declaration of profit or loss which would enable shareholders to decide whether dividend to be paid or to redeem the shares. In effect, according to PW1, there is no declaration of profit by the company which would be capable in fulfilling the requirement under s. 61(3) of the Act.

[24] In his evidence, PW1 explained:

> Distinction must be drawn between profit made by the company and distributable profit declared by a company for the payment of redemption of shares or dividend. In the case of the plaintiff, as of the audited account for the year ending 31.12.2001, there is accumulated loss of RM 4,571,472. Even if in 2001, a small profit is made by the company, it does not means that the profit is distributable because it will be used to set off the accumulated losses. For the plaintiff in 2002 to prudently distribute any dividend or redeem shares, they must make profit in excess of the accumulated losses and only after that profits may be prudently distributed.

[25] Further, PW1 informed the court that it took years to build up the accumulated losses and it would therefore take years to set-off those losses before any distributable profits are available for dividend or for redemption of shares. If one looked at the progressive of the payments made, such payments cannot be from distributable profits as envisaged by the Act. PW1 also explained that profits for redemption under s. 61(3) of the Act, is profits which would be "available for dividend". For profits to be available for dividend, declaration of such profits should be made by directors pursuant to art. 138 of the plaintiff's article of association and any dividends are declared accordingly at a general meeting. PW1 pointed out that when no accounts were prepared for the financial years ending 31 December 2002 to 31 December 2005, they can be no declaration of profits by directors pursuant to the article as there was no director's report prepared for those years.

[26] To a question from learned counsel for the plaintiff whether the plaintiff's company made any profit after ending of the financial year 2001, PW1 said that he was informed by Affin Bank, the plaintiff's secured creditor, that some time in 2004, Affin Bank insisted that monitoring accountant be appointed by the plaintiff to oversee the financial affairs of the plaintiff company. The monitoring accountant is BDO. PW1 said that he has been informed by Affin Bank that the BDO prepared management accounts of the company

for those years. Some of the management accounts such as income statement for the year ended 31 December 2002, balance sheet as at 31 December 2002, balance sheet as at 31 December 2003, income statement for the year ended 31 December 2003 and income statement for the period ended 30 April 2004 were faxed to his office on 29 September 2010 (p. 1 to 5 of bundle E). The management accounts shows that the plaintiff was making losses from the preceding years. He asked this court to note that a receiver and manager was appointed on 2 October 2006 over the company. According to him this would not have happened if the company was making profit.

[27] Ang Mui Koi ("PW2"), the plaintiff's company secretary from 2000 to 2002 testified that no accounts were tabled by the shareholders of the plaintiff after 30 June 2003 even though annual general meetings were held. PW2 in her evidence informed the court that the preferential shareholder has never contracted her or sent any requisition to have a meeting of shareholders of the plaintiff or come to her office to ask about the accounts of the plaintiff.

[28] The plaintiff's third witness, Chan Yen Ing ("PW3") is a chartered accountant since 1996. PW3 was the manager in charge of auditing the plaintiff from 1999 to 2001. According to PW2, the plaintiff did not make any profits at all from 1999 to 2001.

[29] PW2 testified that when the field work for the financial years ending 31 December 1999-2001 was completed, the external auditor of the plaintiff, KPMG realized that some redemption of preference shares was incorrect. Thus, *vide* a letter dated 8 October 2002 (p. 274 of bundle C), she informed the directors of the plaintiff that in 2001 the company redeemed part of Class A RPS Shares amounting to RM1.425 million and based on s. 61(3) of the Act, the preference shares are only to be redeemed out of profits or out of the proceeds of the issue of such shares made for the purposes of redemption. In cross-examination PW3 explained that when KPMG noticed the error, the redemption of Class A RPS Shares is considered illegal as there is no accumulated profit for redemption of preference shares. Further in cross-examination, PW3 said subsequently the directors who are responsible for the accounts decided that it should be treated as the amount due from a director as reflected in exh. P2.

A **The Defendant's Case**

[30] Dato' Ng Eng Tee ("DW1") is the director and shareholder of the first defendant and the second defendant. According to DW1, the first defendant is entitled to legitimately demand for the redemption of the Class A RPS Shares and it is mandatory for the plaintiff to redeem the shares on the maturity dates. As the plaintiff failed, neglected and or refused to perform its obligations to redeem the Class A RPS Shares, the first defendant had legitimately sought legal recourse, including issuing statutory demands pursuant to s. 218 of the Companies Act 1965 and commencing winding up proceedings against the plaintiff. In doing so, the plaintiff have never extorted and/or exerted any improper pressure on the plaintiff to redeem the Class A RPS Shares.

[31] Reference was made to art. 6A(a) (p. 4 of bundle B) and 6A(d) (p. 5 of bundle B) of the plaintiff's article of association. In this respect, DW1 informed the court that these articles provide that the plaintiff is obliged to redeem the Class A RPS Shares upon their maturity dates. According to the redemption clause for the Class A RPS Shares, RPS-A001 shall be redeemed on the first anniversary of the issue date on 25 February 2001, RPS-A002 shall be redeemed on the second anniversary of the issue date on 25 February 2002, and RPS-A003 shall be redeemed on the third anniversary of the issue date on 25 February 2003.

[32] Further, DW1 testified that at all times they had the undertaking and assurance of Firuz, a shareholder and the managing director of the plaintiff through the letter of undertaking dated 26 February 2000 to subscribe for ordinary shares of Arah Cipta to enable Arah Cipta to promptly meet its obligations to redeem the Class A Shares from the first defendant. According to DW1, the first defendant had relied on the assurance of the plaintiff and or Firuz that the plaintiff will fulfil its obligations.

[33] As the plaintiff failed, neglected and or refused to perform its obligations to redeem the Class A RPS Shares, DW1 said that the first defendant had legitimately sought legal recourse, including issuing statutory demands pursuant to s. 218 Companies Act 1965 and commencing winding up proceedings against the plaintiff.

[34] DW1 said that the first defendant has no actual and or constructive knowledge as to the financial state of affairs or the internal management of the plaintiff at all times, and in any event, the plaintiff's obligation to redeem the Class A RPS Shares is not

diminished in any way even if the plaintiff was facing financial difficulties. However, in cross-examination DW1 agreed that in his discussions with Firuz, he was well aware that the first defendant was in a bad financial position and the company was not making profits during the material times.

Issues

[35] Based on the pleadings and evidence adduced by all parties, it is clear that the plaintiff is bringing this action against the first defendant for the return of RM4,678,391.97 which has been allegedly paid by the plaintiff in breach of s. 61(3) of the Act. As such the issues for determination by this court are as follows:

(i) Whether the plaintiff had actually made payment to the first defendant from 2001 to 2005 for the purposes of redeeming the Class A RPS Shares.

(ii) Whether the plaintiff has not made any profit from 2001-2005 to enable it to redeem the Class A RPS Shares.

(iii) Whether the first defendant had actual or constructive knowledge that the share redemption and/or payments paid out to the first defendant from 2001 to 2005 were from the plaintiff's capital and were not from its profits.

(iv) Whether the plaintiff has breached s. 61(3) of the Act.

(v) Whether the plaintiff is estopped from claiming for the return of the sum of RM4,678,391.97 from the first defendant.

Evaluation Of The Evidence And Findings

[36] In coming to a decision in this case, the court has carefully considered the evidence adduced by all the parties in this suit together with the documentary evidence relied upon by them. The court has also gained considerable assistance from the written submissions and authorities filed in court.

Whether The Plaintiff Had Actually Made Payment To The First Defendant From 2001 To 2005 For The Purposes Of Redeeming The Rps Shares

[37] The first issue to be considered is whether the plaintiff had actually made payment to the first defendant from 2001 to 2005 for the purposes of redeeming Class A RPS Shares. Based on the evidence adduced and the documents tendered through PW1, the

court finds that the first defendant had in total issued nine s. 218 notices to the plaintiff for redemption of Class A RPS Shares. Subsequently the plaintiff made the following payments to the first defendant:

No.	Date of Payment	Cheque No.	Amount (RM)
1.	19.6.2001	BCB 340160	200,000.00
2.	22.8.2001	SCB 500044	500,000.00
3.	14.9.2001	ABB 069983	150,000.00
4.	14.9.2001	ABB 069984	150,000.00
5.	14.9.2001	SCB 500047	200,000.00
6.	4.10.2001	ABB 806357	25,000.00
7.	15.12.2001	ABB 806362	100,000.00
8.	29.12.2001	ABB 806363	100,000.00
9.	30.1.2002	ABB 806370	100,000.00
10.	28.2.2002	ABB 806371	100,000.00
11.	31.3.2002	ABB 806372	100,000.00
12.	30.4.2002	ABB 092814	400,000.00
13.	31.5.2002	PBB 023859	436,872.80
14.	30.6.2002	PBB 023860	250,000.00
15.	30.6.2002	PBB 024044	1,889.72
16.	31.7.2002	PBB 023861	250,000.00
17.	31.8.2002	PBB 024046	14,629.45
18.	27.9.2002	ABB 095643	20,000.00
19.	26.10.2002	ABB 117777	20,000.00
20.	10.3.2003	ABB 402178	135,000.00
21.	26.3.2003	ABB 402227	100,000.00
22.	10.4.2003	ABB 402265	150,000.00
23.	10.5.2003	ABB 402180	250,000.00
24.	11.6.2003	ABB 445966	25,000.00
25.	21.7.2003	ABB 466224	25,000.00
26.	28.8.2003	ABB 477848	25,000.00
27.	30.9.2003	ABB 491480	75,000.00
28.	15.10.2003	ABB 491481	25,000.00
29.	31.10.2003	ABB 491482	50,000.00
30.	30.11.2003	ABB 491483	50,000.00
31.	31.12.2003	ABB 491485	50,000.00
32.	31.1.2004	ABB 491486	50,000.00
33.	31.3.2004	PBB 065352	50,000.00
34.	20.7.2004	ABB 629004	150,000.00
35.	5.8.2004	PBB 056386	100,000.00
36.	25.8.2004	ABB 629041	50,000.00
37.	3.9.2004	ABB 629050	100,000.00
38.	10.12.2004	PBB 050000	50,000.00
39.	29.4.2005	PBB 065352	50,000.00
		Total:	RM4,678,391.97

[38] It is not disputed between the parties that out of the 39 payments made to the first defendant totalling RM4,678,391.97, the first five payments totalling RM1,200,000 in 2001 were in fact made by some third parties, ie, Hikmat Akad Sdn Bhd, Jalinan Bayu Sdn Bhd and Kulim Techno-City Sdn Bhd, and the last two payments totalling RM100,000 were in fact made by Pembinaan Gemuncak Sdn Bhd.

[39] The first defendant submitted that the plaintiff has failed to prove that it has made payment of RM4,678,391.97 as a total amount of RM1.3 million was made by third parties.

[40] However, learned counsel for the plaintiff argues that payments made by third parties should be seen as payment by the plaintiff as it is still paid for the purposes of redemption of shares between the parties. Further it was submitted that when cheques were issued by the third parties on behalf of the plaintiff, the plaintiff is obligated to repay the third parties who are the creditors of the plaintiff. This would in effect cause the reduction of the plaintiff's share's capital and an increase in liabilities which are owed to the third parties.

[41] On this issue, the court finds that in cross-examination DW1 agreed that the payments from the third parties are in fact received by the first defendant towards payment of redemption of preference shares. This is what DW1 said in evidence:

> GT I put it to you, these payments are in fact received by you and Piala Gagasan towards payment of redemption of preference shares, do you agree or not?
>
> Ng Yes

[42] Of material consideration is the fact that DW1 had admitted in cross-examination that the third parties did not owe any money to the first defendant and there is no contractual obligation for the third parties to make payment to the first defendant. In fact, DW1 agreed in cross-examination that those payments by the third parties were taken into account by the first defendant when subsequent demand was sent to the plaintiff (refer to p. 262 of bundle C). This fact was never rebutted by the first defendant.

[43] The court notes that PW1 explained that once shares are redeemed, the share capitals available for creditors are reduced. Therefore, there is less money available to be distributed to the creditors. Payments made by third parties for redemption of those

shares, would have been effectively taken up and viewed in the accounts of the plaintiff as monies owing to those third parties. The plaintiff at that juncture was making losses and should not be taking up any additional creditors when the share capital provided by the first defendant as preferential shareholders was available for the benefit of all creditors. The detriment to the creditors of the plaintiff is the same.

[44] The first defendant never cross-examined PW1 for an alternative interpretation or led any evidence to show the interpretation of the third parties payments in the financial statement.

[45] Further, learned counsel for the first defendant in his submissions pointed out that there was no actual redemption by the plaintiff of the class A RPS Shares to the first defendant as shown in exh. P2. He further argued that the total shares in exh. P2 shows that there was no redemption of shares made by the plaintiff as the first defendant and the second defendant still remains as the preferential shareholders holding to same number of preferential shares of the plaintiff.

[46] In this regard, the court agrees with the submissions of learned counsel for the plaintiff that this issue would be irrelevant as DW1 had testified that payments were made by the plaintiff to redeem the first defendant's shares. The court also notes that DW1 has agreed in cross-examination that the shares recorded in exh. P2 should have been lesser as the payments received by them were for the purposes of redemption of shares in which share certificates were returned to the plaintiff's previous solicitors upon the first defendant receiving the payments. As such, I agree with the plaintiff's submission that the first defendant had contradicted themselves by alleging that there was in fact no redemption of RPS Shares made by the plaintiff's company.

[47] Further the court is of the view that the fact that the plaintiff's company and its officers did not take steps to update or amend the share register as confirmed by PW2 in cross-examination, does not change the substance that redemption of shares had been made by the plaintiff.

[48] The evidence of PW3 in respect of the payments made by the plaintiff in 2001 is also pertinent to note. As the court recalls, between 1999 to 2001, PW3 was in charge of auditing the plaintiff. She testified that the first set of the financial statement in exh. P1

shows that there was redemption of shares and reduction of capital. However, the second set of the financial statement in exh. P2 does not show any redemption by the company.

[49] In this regard, PW3 confirmed in cross-examination that there was payment for redemption of preferential shares of RM1.425 million and there was actual payment going out from the plaintiff's fund. In view of this, PW3 said that *vide* a letter from KPMG dated 8 October 2002 (p. 273 of bundle C), she highlighted to the directors of the first defendant that the plaintiff breached s. 61(3) of the Act. In the light of the opinion by KPMG, PW3 pointed out that the director decided to take responsibility of the amount and hence there was an amount due from a director which has been increased by RM1.4 million as reflected in exh. P2. The evidence of PW3 which remains unrebutted is that the plaintiff has actually redeemed the shares by paying the money to the plaintiff rather than reflecting it in the capital side of balance sheet, the directors then decided to record it as they owe the plaintiff's company RM1.425 million.

[50] Therefore, with regards to the evidence by PW3 and supported by the contemporaneous letter from KPMG dated 8 October 2002, the court is of the view that monies were actually paid to the first defendant and the equity of the plaintiff's company should have been reduced to reflect this even though this is not reflected in exh. P2. The evidence of PW3 which is corroborated by DW1 is that there were actual redemptions made by the plaintiff to the first defendant.

[51] In the light of the evidence adduced, the court takes the view that the plaintiff had actually made payments to the first defendant from 2001 to 2005 for the purposes of redeeming the RPS Shares.

Whether The Plaintiff Had Not Made Any Profit From 2001 To 2005 To Enable It To Redeem The RPS Shares

[52] The next matter raised by learned counsel for the plaintiff was that the plaintiff had not made any profits from 2001 to 2005 to enable it to redeem the RPS shares. The Financial Statements of the plaintiff's company for the years ending 31 December 1999, 31 December 2000 and 31 December 2001 (exh. P1) show accumulated losses of RM4,571,472 in which there has been no audited account prepared for the subsequent years.

[53] Learned counsel for the first defendant has submitted that for the relevant years of 2001 to 2005, the plaintiff has only produced the financial statements for the year ended 31 December 2001, but has failed to produce the financial statements for the years ended 31 December 2002, 31 December 2003, 31 December 2004 and 31 December 2005 to prove that the plaintiff was not making profit.

[54] The court notes that the evidence of PW2 that there were annual general meetings held after 2003 and there were no account audited. PW3 also confirmed that although they commenced the field work for financial year of 2002, they never completed the audit because of the lack of the co-operation from the plaintiff. As such, I find that it is impossible for the plaintiff to produce the audited accounts for the financial years ending 31 December 2002, 31 December 2003, 31 December 2004 and 31 December 2005 as evidence.

[55] The first defendant while contending that the payments could be made out of profit had made no attempt to adduce evidence to rebut that there has been profit made by the plaintiff's company at the material time. As such, the first defendant's submission that it is not proven that the plaintiff has not made any profit is unsustainable.

[56] The court also finds that by the first defendant's own witness, DW1, it shows that the plaintiff was in financial difficulty at the material time. This is what DW1 said in re-examination:

> Cheah: Do you consider after looking through all the letters that Gideon Tan referred to earlier, do you consider Arah Cipta might have gone through these cash flow issues in the early stage of property construction?
>
> Ng: In 2002, I believe he could have cash flow temporary and could catch up, but by 2003, I started to wonder whether his optimism was there. That's why I was willing to settle with him on the preferential shares to be exchanged for property.

[57] It is the plaintiff's position which is adduced through the evidence of PW1 that for a company to redeem preference shares or distribute dividend, it must make a profit before creating such an account and put the money aside for such purpose. Without a proper audit and/or account in place before a general meeting of

shareholders there can never be a declaration of profit or loss which would enable shareholders to decide whether dividend is to be paid or to redeem the shares.

[58] PW1's evidence is supported by the evidence of KPMG auditor, PW3, who has 15 years of experience as a Chartered Accountant. The court notes that PW1 was a subpoena witness and no witness statement was prepared beforehand. On this issue, she also testified that there must be excessive profits to cover the loss.

GT: I want to ask then a technical accounting question. If you look at the accumulated losses on page 44 Bundle D, you will note there that the accumulated losses is in excess of RM4.5 million, for the following year, for profits to be redeemed, if there are any profits to be put aside for a dividend account or redemption account, one would have to have profits in excess of this to wipe out the losses, am I correct?

Chan: Yes.

GT: Following from your answer, in order for any other for any redemption of redeemable preferential shares, for any dividends to be paid for the years 2002, 2003, there must be profit to essentially extinguish excess this accumulated losses RM4.5 million, am I correct?

Chan: Yes.

[59] In my view, the facts that there were no audited accounts lodged with CCM for the subsequent years from 2002 indicate that the plaintiff's company was at the material time suffering losses and were unable to declare profits. This is supported by the evidence of PW1, Mr. Lean who testified that the bank insisted monitoring accountant appointed by the plaintiff to oversee the financial affairs of the plaintiff company and management accounts were prepared by the monitoring accountant. The management accounts prepared by Affin Bank, one of the secured creditors of the plaintiff which was faxed to the liquidator's office show that the plaintiff company was suffering losses. Furthermore, a receiver was appointed on 2 October 2006 over the company. All these facts supported the plaintiff's contention that from the year 2001 to 2005 when the payments were made by the plaintiff to the first defendant for the purposes of redeeming the shares, the plaintiff's company was not profitable and in fact suffered great losses.

[60] Besides being informed by Firuz that the plaintiff was unable to pay, as admitted by DW1 the court notes that there are also numerous contemporaneous letters from the plaintiff to the first defendant which show that the plaintiff was not making profit. (See memorandum from the plaintiff to the first defendant - p. 275 of bundle C, letter from the plaintiff to the first defendant dated 15 October 2002 - p. 276 of bundle C, Letter from the plaintiff to the first defendant dated 6 June 2003 - p. 291 to 293 of bundle C, letter from the plaintiff to the first defendant dated 10 June 2003 - p. 294 to 297 of bundle C).

[61] On the balance of probabilities, based on the evidence adduced through the liquidator of the plaintiff (PW1), the company secretary (PW2) the chartered accountant (PW3) and the contemporaneous documents, I am of the view that the plaintiff has proven that there is no profit available at the material time for the purpose of redeeming the first defendants' shares.

Section 61(3) Of The Companies Act, 1965

[62] Having decided that the plaintiff was not making profit from 2001-2005, I now turn to the provision of s. 61(3) of the Act. Section 61(3) of the Act is set out as follows:

> Section 61(3) of the Act
>
> The shares shall not be redeemed:
>
> (a) Except out of profits which would otherwise be available for dividend, or out of the proceeds of a fresh issue of shares made for the purposes of the redemption; and
>
> (b) Unless they are fully paid up.

[63] The pre-conditions for redemption of shares are set out in s. 61(3) of the Act, namely, that the shares shall not be redeemed:

(a) Except out of profits that would otherwise be available for dividends or out of the proceeds of a fresh issue of shares made for the purposes of the redemption, and

(b) Unless they are fully paid-up.

[64] Learned counsel for the plaintiff did not dispute that the plaintiff has an obligation to redeem the RPS Shares issued to the first defendant. However, it was argued that the RPS Shares can only be redeemed by the plaintiff out of profits but not using the

company's capital pursuant to s. 61(3) of the Act. This would necessarily mean that the RPS Shares can only be redeemed if the plaintiff declared dividends at the material time. A

[65] To support his contention, learned counsel for the plaintiff referred to *Malaysian and Singapore Company Law & Practice,* p. 3872 [27-080] where it states as follows: B

> Given that a dividend is payable out of profits, when must those profits be in existence? The question arose in *Marra Development Ltd v BW Rofe Pty Ltd.* (1977-1978) CLC 40-375; [1977] 2 N.S.W.L.R. 616 where it was decided that the company must determine the availability of profit at the time the dividends are declared. Thus, the requirement of the companies legislation that the company cannot pay dividends except out of profit must be complied with at the time the company declares the dividend. C

[66] The court notes that dividends are declared pursuant to art. 137 of the plaintiff's company articles of association (on p. 400 of bundle C). Article 137 states that: D

> The profits of the Company (Arah Cipta) available for dividend and resolved to be distributed shall be applied in the payment of dividends to the Members in accordance with their respective rights and priorities. The Company in general meeting may declare dividends accordingly. E

[67] As such, the article specifically states that profits must be available and "resolved to be distributed" and this means that it may only be resolved or decided at a general meeting. For this to be done, I agree with the learned counsel for the plaintiff's submissions that audited accounts would therefore have to be prepared and put before Members for their consideration and decision. F G

[68] The New Zealand case of *Hilton International Limited (in liq) v. Hilton & Anor* [1988] 4 NZCLC 64,721 at p. 64,750 provides some guidelines as to what is available profits for the purposes of dividend in relation to s. 61(3)(a) of the Act. H

[69] In that case, the learned judge Tipping J stated that the company must be solvent to enable it to declare dividends. The test set-out are as follows: I

> (1) Dividends including capital dividends may be paid only out of profits, or putting the matter conversely, may not be paid out of paid up capital without the Court's approval of a reduction of capital.

(2) The payment of a dividend out of paid up capital will occur if the payment has the effect of reducing the company's net assets (often referred to as shareholders' funds) below the amount of its paid up capital. The expression nett assets for present purposes means the amount which remains after deducting all the company's liabilities both actual and contingent prudently assessed from the sum of all its assets prudently valued. Accounts should be taken to demonstrate the company's position overall. A capital or income transaction should ordinarily not be viewed in isolation.

(3) whether there are profits and if so how much thereof should be paid out as dividend is essentially a matter of commercial assessment and judgment but that assessment and judgment must be made and exercised with these and the following propositions in mind.

(4) No dividend may be paid, whether out of capital or income profits, if the company is in a state of trading insolvency.

(5) No dividend may be paid, whether out of capital or income profits, if the company is in a state of balance of insolvency, or will enter that state as a result of the payment.

(6) No dividend may be paid, whether out of capital or income profits, if the company is in a state of doubtful trading or balance sheet solvency unless the directors can demonstrate, if later challenged, that they believed in good faith and on reasonable grounds that the payment of the dividend would not jeopardise the company's ability promptly to satisfy its creditors present and future and whether secured or unsecured.

(7) Even if the company is fully solvent in both the trading and balance sheet senses no divided may be paid whether out of capital or income profits if the directors ought to have appreciated that such payment was likely to jeopardise the company's balance sheet or trading solvency.

In the above decision, the learned Tipping J used the phrases "trading insolvency" and "balance sheet insolvency".

Trading insolvency refers to a situation where the company is unable to pay its debts as it falls due. Gower (4th Edn, p231) also states that the proposition that dividends must not be paid if the result is that the company is unable to pay its debts applies where the company is unable to pay its debts as they fall due. While it is well established that a company may borrow in order to obtain the case necessary to pay the dividend (*Stringer*'s case [1896]) L.R. 4 Ch. App.475; *Mills v.*

Northern Railway of Buenos Ayres Co. [1870] L.R. 5 Ch. App. 621) it appears that the moneys borrowed together with funds in hand must be sufficient to cover not only the dividend but also liabilities presently due and payable.

Balance sheet insolvency refers to a situation where the company's assets are less than its liabilities as state in the balance sheet.

[70] Applying the principles and authorities above to the present case, the facts and evidence adduced show that the first defendant has taken monies for redemption of shares when the plaintiff was not profitable.

Knowledge Of The First Defendant That The Plaintiff Is Insolvent

[71] The court finds that based on the evidence adduced, DW1 knew that the plaintiff is in insolvent and in financial difficulty. In cross-examination, DW1 was referred to the plaintiff's letter to the first defendant dated 15 October 2002 in response to the first defendant's demand for the plaintiff to redeem the preference shares. In this respect, DW1 agreed that the letter shows that the plaintiff is in financial difficulty. In addition, the first defendant has sent few s. 218 notices and those notices demanded specific sum. The fact that the plaintiff was unable to pay the first defendant the sum fully demanded, shows that the plaintiff at that material time would be insolvent. Further, in cross-examination DW1 admitted that in the discussions he had with Firuz, he was aware that the plaintiff was in bad financial position and the plaintiff was not making profits.

No Management Involvement By The First Defendant

[72] DW1 claimed that as the preferential shareholder, the first defendant had never been invited to attend any Annual General Meeting held for the preferential shareholders. PW2 has confirmed that she has never been instructed by the plaintiff's directors to invite any preferential shareholders to any Annual General Meeting. The first defendant claimed that they have never been involved in the management of the plaintiff, hence they would not know the financial status of the plaintiff.

[73] In response, the plaintiff submitted that the shareholders have the rights to obtain the account of a company. In support of his submission, counsel relied on art. 6A(i)(ii) of the plaintiff articles of association (Appendix 1), which provide as follows:

> (i) as regards undertakings:
>
> so long as any RP Class A shares remains liable to be redeemed or is subsisting;
>
> (ii) each of the RPS Class A Shareholders shall also be entitled, where available, upon request to receive profits and loss accounts, balance sheets, director's report and Company's financial reports together with statement of account in respect of the Company's housing development account.

[74] The court finds that the evidence of DW1 has proven that he has knowledge of the financial status of the plaintiff although no account was forwarded to the first defendant, as he will personally speak to Firuz. At more than one occasion, Firuz has mentioned to DW1 personally that the plaintiff is in financial difficulty.

[75] As such, I agree with learned counsel for the plaintiff that the truth of the matter is the first defendant never bothered to exercise its right to find out the financial status of the plaintiff. They choose to be ignorant and ignorance is not a defence.

The Plaintiff Directors Were Not Called As Witnesses

[76] The first defendant submitted that the fact that neither the directors of the plaintiff (Firuz and Sharifah Fatijah) were called by the plaintiff to give evidence at the trial on the Actual Payments, Actual Share Redemption and Non-Profitability from 2001 to 2005 must therefore be presumed by the court that evidence if produced would be unfavourable to the plaintiff. Accordingly, the court should draw adverse inference against the plaintiff.

[77] The court finds that the evidence referred to earlier such as the audited account, management accounts prepared by BDO who is the monitoring accountant, the subsequent receivership and winding up of the plaintiff show that the plaintiff is insolvent and therefore there cannot be any profit to redeem shares. As such, there is no necessity to call Firuz or Sharifah Fatijah as witness for this case. The issue which the liquidator's case is concern about is that there was redemption without profit.

[78] Furthermore, the evidence adduced through PW1 and PW3 show that large amount of accumulated losses has to be set off before any profit is available for redemption. Given the cash flow problems of the plaintiff's company, clearly there was no profit available. On the balance of probabilities, the court finds that the liquidator has discharged his burden on this point hence there is no necessity to call Firuz or his wife as witness.

[79] In any event an adverse inference under s. 114(g) of the Evidence Act can only be drawn if there is a withholding or suppression of evidence. In the present case, I do not think that the plaintiff has withheld or suppressed any evidence.

[80] In the case of *Munusamy Vengadasalam v. PP* [1987] 1 CLJ 250; [1987] CLJ (Rep) 221 Mohamed Azmi SCJ at p 223 held:

> It is essential to appreciate the scope of s. 114(g) lest it be carried too far outside its limit. Adverse inference under that illustration can only be drawn if there is withholding or suppression of evidence and not merely on account of failure to obtain evidence. It may be drawn from withholding not just any document, but material document by a party in his possession, or for non-production of not just any witness but an important and material witness to the case.

Whether The Plaintiff Has Contractual Obligation To Redeem The Rps Shares

[81] The first defendant in its written submission is not denying that s. 61(3) of the Act provides that the redeemable preference shares shall not be redeemed except out of profits which would otherwise be available for dividend, or out of the proceeds of a fresh issue of shares made for the purposes of the redemption.

[82] However, despite the provisions of s. 61(3) of the Act, the first defendant contended that a company cannot argue that it does not have any contractual obligation to redeem the redeemable preference shares, simply because it has not made any profit to enable it to do so. Further, it was submitted that whether the company made profit or not, it is still obliged to redeem the redeemable preference shares.

[83] The first defendant referred to five cases concerning redemption of preferential shares to support its contention. The cases relied in *UOB Venture Investments Ltd v. Tong Garden Holdings Pte Ltd* [2000] 3 SLR(R) 585, paras 19-21, at 591-592; *TNT*

Australia Pty Ltd v. Normandy Resources NL [1989] 1 ACSR 1, at 21; *Mutual Life and Citizens Assurance Co Ltd v. Mosgiel Ltd* [1994] 1 NZLR 146, at 152; *Re Marra Developments Ltd (No 2)* [1978] 3 ACLR 798, at 799-780; *Re Holders Investment Trust Ltd* [1971] 2 All ER 289, at p 292.

[84] I must point out that despite the searches of this court, it appears that there is no case in this country has this problem been litigated. This was confirmed by counsels for the plaintiff and the first defendant.

[85] In the Singapore case of *UOB Venture Investments Ltd v. Tong Garden Holdings Pte Ltd* [2000] 3 SLR (R) 585 at 592 the main issue raised was whether the defendant was in breach of its obligation to redeem preference shares under the investment agreement. The defendants in that case argued that the plaintiff had no remedy against it as it had not made any profits to redeem the preference shares incompliance with s. 70(3) of the Companies Act (Cap 50, 1994 Rev Ed). Section 70(3) of Cap 50 is *pari materia* to s. 61(3) of the Act.

[86] The court in *UOB Venture Investments* case held that:

> Under the contract the obligation to redeem on notice is absolute. When first defendant contracted for that obligation they were fully aware of s. 70(3) of the Companies Act. They must therefore be presumed to have contracted on the basis of section 70(3) of the Companies Act. In the context of s. 70(3) of the Companies Act, the company defendants' contractual obligation to redeem implies that they must bustle about to bring in the funds. They must expend all their energy in their veins to find the funds in the manner permitted by s. 70(3) of the Companies Act. The defendants are not allowed to call in aid their own indolence and inaction. Nor can they seek shelter under s. 70(3) of the Companies Act. Their contractual obligation implies that they will see to it that their subsidiary and related entities and persons will put them in sufficient profits or take up new shares to produce sufficient funds. Finding the funds by those two options, I repeat, is an absolute obligation. If they fail there are three remedies to the preference shareholder: equity can compel them to do so by an order for specific performance; common law can award damages; and company law can order them to be wound up. If damages are awarded they must come from the profits or fresh share issue. In the event of liquidation the shareholders' claim would rank after the claims of creditors.

[87] In the New Zealand case of *Re Marra Developments Ltd (No 2)* [1978] 3 ACLR 798 at 799 the Supreme Court of New South Wales had the occasion to consider the scope of s. 61 of the Companies Act 1961 (NSW) which is *pari materia* to s. 61(3) of our Act. Wade J delivering the judgment of the court stated:

> When the time comes for redemption, the redemption monies will have to be paid either out of profits which would otherwise be available for dividend or out of the proceeds of a fresh issue of shares made for the purposes of the redemption. If MDL has no such profits available or is unable to carry through the necessary fresh issue of shares, the consequence will simply be, in my opinion, that MDL will then become in breach of its obligation under sub-art (7). The preference shareholders would in such circumstances be entitled to have the company wound up.

[88] Further down the page, the court explained:

> "MDL" is a reference to the company. Section 61 provides, in short, that preference shares shall not be redeemed except out of profits which would otherwise be available for dividend, or out of the proceeds of a fresh issue of shares made for the purposes of the redemption.

[89] In *Mutual Life and Citizens Assurance Co Ltd v. Mosgiel Ltd* [1994] 1 NZLR 146 at 151 a decision of the New Zealand Court of Appeal, is also relevant to this issue. In it, Richardson J delivering a joint judgment of the court made this statement at p. 152:

> Section 66(1) of the Companies Act bars redemption for cash except out of profits available for dividend or out of proceeds of a fresh issue of shares. On first principles such a contractual obligation on Mosgiel's part may exist even though there are restrictions governing the mode of performance. However, if the company is in breach the remedies available in connection with that breach must not be inconsistent with the legislative constraints on the sources of redemption funds.

[90] Similarly in *TNT Australia Pty Ltd v. Normandy Resources NL* [1989] 1 ACSR 1 at 21 the Supreme Court of South Australia had occasion to consider whether s. 120(3) of the Companies Act prohibited the respondent from redeeming the preference shares. In this case, s. 128(3) of the Companies Code states that the "shares shall not be redeemed except out of profit".

[91] In *TNT Australia* case, O'Loughlin J held that:

> In my opinion there are no deficiencies in the articles of association; Normandy was able, lawfully, to issue the relevant shares and will be, in due course of time, lawfully able to redeem those shares subject only to its ensuring that redemption is effected out profits or the proceeds of a fresh issue of shares as required by s. 120(3)(b).
>
> How could it be appropriate to give an option to a shareholder to demand redemption of his shares when the Code specifically limited the source of redemption to profits that would otherwise be available for dividends or to a fresh issue of shares made for the purposes of the redemption? Upon reflection I think that there are two answers to that question. The first is this: if a company is minded to issue redeemable preference shares on terms that include a term enabling the holders to demand redemption, then it is for the company to organise its affairs so as to ensure that it will have appropriate profits out of which to meet its obligations to redeem: or it is incumbent on the company to so organise its capital structure that it will, as and when required, be able to make a fresh issue of shares for the purposes of the redemption. The second answer is somewhat draconian; if a company chooses to issue redeemable preference shares in the manner just described and is thereafter unable to meet its contractual commitments at the time when the shareholder exercises his option to seek redemption, then the company faces the prospect of being wound up under the "just and equitable" rule at the suit of the disgruntled shareholder.

[92] Similar issue was also considered by the Federal Court of Australia in the case of *Commissioner of Taxation v. Coppleson* ALR Volume 6 1981-1982 p. 428. In the course of determining whether there had been a valid gift, the court had to consider whether if the funds out of which redemption is envisaged by s. 61(3) are not available a company would be in default in refusing to redeem in accordance with its articles but in a manner inconsistent with s. 61(3).

[93] In *Coppleson* case the court held as follows:

> In this case, I of the opinion that we should approach the matter as a question of principle. Both parties contracted on the basis of the law and part of that law is section 61(3) of the Act. The parties cannot be presumed to have assumed obligations which it is unlawful for one of the parties to fulfil. It is not a case where supervening legislation operates to make the fulfilment of its obligations by one party unlawful. Rather, the parties are contracting on the basis of a given law. In these circumstances, failing the availability of one or both of the funds specified in

> s. 61(3), the company is not in default under its contract with the holders of redeemable preference shares if it fails to redeem after receipt of the requisite notice.
>
> As the company would not be in default under its contract by failure to redeem in the circumstances of this case, the question of an appropriate remedy for holders of redeemable preference shares to enforce their contractual rights does not arise. However, if the company does not redeem following the receipt of notice from such shareholders, it may be appropriate to consider winding up, not because the company is in default under its contract with the holders of redeemable preference shares, but on the basis that it is just and equitable so to do.
>
> The company, in failing to redeem, would not be misusing its legal rights but merely acting, as it is obliged to do, in accordance with the law. The parties must be presumed to be aware of the statutory limitations.

[94] Finally, in *Re Holders Investment Trust* (AER) 1971 2 at 587, Megarry J referred to a contention of the first defendant that if there were no funds available (within the terms of s. 58(1) of the Companies Act 1948 (UK), which is the corresponding section to s. 61(3) of the Act, the company would not be in default under an article requiring it to redeem redeemable preference shares on a given date. On this issue his Lordship said:

> This is a point that I do not have to decide ... but for the present I need say no more than that I share the doubts which have been expressed about the company's contention.

[95] The court observes that before Megarry J was an application to reduce the capital of the company by cancelling redeemable preference shares redeemable in 1971, in exchange for unsecured loan stock, redeemable some four to nine years later. The main issue was the propriety of certain holders of both redeemable preference shares and equity stock voting for the proposal motivated by its benefits for them as ordinary stockholders, rather than considering the benefits and detriments for holders of redeemable preference shares. The passage contains a passing comment on the advice given to a party. The case concerned quite a different issue, it cannot be decisive of the question now before this court.

[96] The court has carefully perused the above authorities and I accept the submissions by learned counsel for the plaintiff that the authorities cited by the first defendant support the plaintiff's

position that redeemable preference shares shall not be redeemed except out of profit which would otherwise be available for dividend or out of the proceeds of a fresh issue of shares made for the purpose of the redemption. The authorities also lay down the option to be exercised by a preference shareholder to demand redemption of its redeemable preference shares subject to s. 61(3) of the Act.

[97] In my judgment, s. 61(3) of the Act limits the funds from which redemption may be made. In this regard, when the time comes for redemption, the redemption monies will have to be paid either out of profits which would otherwise be available for dividend or out of the proceeds of a fresh issue of shares made for the purposes of the redemption. If the plaintiff has no such profits available or is unable to carry through the necessary fresh issue of shares, the consequence will simply be that the plaintiff will then become in breach of its obligation under arts. 6A(d) and 6B(d) of the plaintiff's articles of association. The first defendant being the preferential shareholders would in such circumstances be entitled to have the plaintiff wound up but certainly not to cause redemption in breach of s. 61(3) of the Act, preferring themselves ahead of all other creditors of the plaintiff.

[98] As stated earlier, the documentary and oral evidence adduced show that the plaintiff company was at the material time when the demand and payments were made to the first defendant for redemption of the redeemable preference shares suffered great losses in which there are no available profit to redeem the shares from the first defendant. As such, in this present case, in my view, the RPS Shares was redeemed by the plaintiff in contravention of s. 61(3) of the Act.

Estoppel

[99] The first defendant contends that the issues raised by the plaintiff that it is not obliged to redeem the RPS Shares based on the alleged non-availability of profits and the alleged breach of s. 61(3) of the Act had previously been raised by the plaintiff when it applied to strike-out the winding-up petition filed by the second defendant in the Johor Bahru High Court No. MT2-28-158-2005 ("the JB Suit"). The first defendant relied on the case of *Asia Commercial Finance (M) Berhad v. Kawal Teliti Sdn Bhd* [1995] 3 CLJ 783 to support its contention that the doctrine of estoppel will apply in this case.

[100] In *Asia Commercial Finance*, Peh Swee Chin (FCJ) delivering the judgment of the Federal Court said: A

> What is *res judicata*? It simply means a matter adjudged, and its significance lies in its effect of creating an estoppel *per rem judicatum*. When a matter between two parties has been adjudicated by a court of competent jurisdiction, the parties and their privies are not permitted to litigate once more the *res judicata*, because the judgment becomes the truth between such parties, or in other words, the parties should accept it as the truth; *res judicata pro veritate accipitur*. The public policy of the law is that, it is in the public interest that there should be finality in litigation - *interest rei publicae ut sit finis litium*. It is only just that no one ought to be vexed twice for the same cause of action - *nemo debet bis vexari pro eadam* cause. Both maxims are the rationales for the doctrine of *res judicata*, but the earlier maxim has the further elevated status of a question of public policy. B C D
>
> Since a *res judicata* creates an estoppel *per rem judicatum*, the doctrine of *res judicata* is really the doctrine of estoppel *per rem judicatum*, the latter being described sometimes in a rather archaic way as estoppel by record. Since the two doctrines are the same, it is no longer of any practical importance to say the *res judicata* is a rule of procedure and that an estoppel *per rem judicatum* is that of evidence. Such dichotomy is apt to give rise to confusion. E
>
> ... there are in fact two kinds of estoppel *per rem judicatum*. The first type relates to cause of action estoppel and the second, to issue estoppel, which is a development from the first type. F
>
> The cause of action estoppel arises when rights or liabilities involving a particular right to take a particular action in court of a particular remedy are determined in a final judgment and such right of action in the cause of action, merges into the said final judgment; in laymen's language, the cause of action has turned into the said final judgment. The said cause of action may not re-litigated between the same parties because it is *res judicata*. G
>
> In order to prevent multiplicity of actions and also in order to protect the underlying rationales of estoppel *per rem judicatum* and not to act against them, such estoppel of cause of action has been extended to all other causes of action (based on the same facts or issues) which should have been litigated or asserted in the original earlier action resulting in the final judgment, and which were not, either deliberately or due to inadvertence. H I

A On the other hand, the issue estoppel literally means simply an issue which a party is estopped from raising in a subsequent proceeding. However, the issue estoppel, in a nutshell, from a consideration of case law, means in law a lot more, ie that neither of the same parties or their privies in a subsequent proceeding is entitled to challenge the correctness of the decision of a previous final judgment in which they, or their privies, were parties.

This sounds like explaining a truism, but it is the corollary from that statement that is all important and that could have given birth to the controversies alluded to above; the corollary being that neither of such parties will be allowed to adduce evidence or advance any argument to contradict such decision.

It is important to bear in mind the manner in which the issue estoppels operates in preventing such contradiction of the previous judgment.

There is one school of thought that issue estoppel applies only to issues actually decided by the court in the previous proceedings and NOT to issues which might have been and which were not brought forward, either deliberately or due to negligence or inadvertence, while another school of thought holds the contrary view that such issues which might have been and which were not brought forward as described, though not actually decided by the court, are still covered by the doctrine of *res judicata* ie, doctrine of estoppel *per rem judicatum*.

We are of the opinion that the aforesaid contrary view is to be preferred; it represents for one thing, a correct even though broader approach to the scope of issue estoppel. It is warranted by the weight of authorities to be illustrated later. It is completely in accord or resonant with the rationales behind the doctrine of res judicata, in other words, with the doctrine of estoppel *per rem judicatum*. It is particularly important to bear in mind the question of the public policy that there should be finality in litigation in conjunction with the exploding population; the increasing sophistication of the populace with the law and with the expanding resources of the courts being found always one step behind the resulting increase in litigation.

[101] It is relevant to note that in the JB Suit, the second defendant filed a winding-up petition against the plaintiff on the basis that the plaintiff's company has failed to redeem the Class B RPS Shares which has matured since 25 February 2004 and thus it is unable to pay its debt amounting to RM6,898,9665.60 to the

second defendant. Subsequently, the plaintiff had filed an application to strike out the second defendant's petition to wind up the plaintiff under O. 18 r. 19 of the RHC.

[102] I have carefully perused the striking out application in the JB Suit and find that the subject matter of the application was whether the plaintiff has a contractual duty to redeem the Class B RPS Shares when s. 61(3) of the Act provides that preferential shares shall be paid out of profits which otherwise be available for dividend.

[103] The court finds that in this present action, the main issue before the court is whether the share redemption or payment paid by the plaintiff to the first defendant from 2001 to 2005 were not from its profits, is in breach of s. 61(3) of the Act.

[104] Thus, in my judgment the issues and reliefs sought in this present case and the striking out application in the JB Suit do not relate substantively to the issues and reliefs sought in the instant case. Applying the principle in *Asia Commercial* case, the plaintiff is not estopped from bringing this present action.

Conclusion

[105] In conclusion, the court finds that based on all the evidence adduced, the plaintiff was not making profit, and there was no new subscription of RPS Shares by Firuz. Therefore, the payment of RM4,678,391.97 to the first defendant in respect of the redemption of the Class A RPS Shares is contrary to s. 61(3) of the Act. As such, the sum of RM4,678,391.97 is to be refunded to the plaintiff as the first defendant has received the money wrongfully. Accordingly, the plaintiff's claim against the first defendant is hereby allowed with costs.